FOR ARGUMENT

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Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-6997

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

EUGENE JOHN CARELLA,
APPELLANT,

v.

STATE OF CALIFORNIA,
APPELLEE.

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Vehicle Code section 10855, that an individual who willfully and intentionally fails to return a rental car within five days after the rental agreement has expired is presumed to have embezzled the vehicle.

2. Whether California Vehicle Code section 10855 violates due process of law.

3. Whether appellant was denied due process of law by a jury instruction, given pursuant to California Penal Code section 484, subdivision (b), that intent to commit theft by fraud is presumed when an individual who has rented property pursuant to a written contract fails to return it to its owner within 20 days after the owner has made written demand by registered mail following the expiration of the written agreement.

4. Whether California Penal Code section 484, subdivision (b) violates due process of law.

5. Whether, assuming there was instructional error, the *Chapman* harmless-error test can apply to the instant case.

6. Whether this Court or the court below should undertake the harmless-error inquiry in the first instance.

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NO. 87-6997

IN THE
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October Term, 1988

EUGENE JOHN CARELLA,
APPELLANT,

v.

STATE OF CALIFORNIA,
APPELLEE.

ON APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee hereby adopts the statement of the case set forth by Appellant in his brief[1], except for the paragraph numbered 1,[2] subject to the following corrections or additions:

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1. Brief of Appellant, 2-9.

2. Brief of Appellant, 2-4. Numbered paragraph 1 consists of an exposition of what appellant conceives to be the relevant law of California. Since this exposition is in our view incomplete and, indeed, unintentionally misleading in a few respects, we propose to discuss the applicable California law in our argument.

(1) Appellant recites at page 5 of the brief that Ms. Ayres "was unable to corroborate appellant's assertion that he had telephoned that evening to talk to the detective who had been inquiring about the status of the rental car." The point is that there was no evidence of such an assertion by defendant, who did not testify at his trial.

(2) Appellant describes at page 6 the conflict as to what Ms. Pfister testified at the trial, referring to her declaration which was filed with appellant's petition for rehearing in the court below and to what is contained in the settled statement on appeal. In our view, appellant has improperly referred to the contents of Ms. Pfister's declaration since, under California law, statements contained in affidavits or declarations filed concurrently with a petition for rehearing are not to be considered as part of the record on appeal for the purpose of ascertaining what evidence was presented at a criminal trial. *See People* v. *Washington*, 71 Cal.2d 1061, 1086, 80 Cal.Rptr. 567, 458 P.2d 479, 493-494 (Cal. 1969).[3]

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3. This Court noted probable jurisdiction as to only Questions I, II, III, IV, V, and VII presented by the jurisdictional statement. JA 77. Accordingly, whether the court below properly denied appellant's requests that reporter's transcript of the trial proceedings be included in the record on appeal is not before the Court in the instant proceeding; and it must be presumed by this Court that these requests were properly denied. However, this is not to say that this Court is precluded from properly concluding that the record on appeal, given the absence of a reporter's transcript of the trial proceedings, provides an insufficient basis for this Court to conclude that instructional error was harmless beyond a reasonable doubt.

It should be incidentally noted that appellant's motion for the reporter's transcript, which his brief at page 9 reports as having been denied by order on January 28, 1988, was filed on January 26, 1988. JA 49-59. This motion was hence filed after the filing of briefs and on the date set for oral argument, at which appellant did not appear. (See Motion of Appellee to Dismiss, at App 16.)

SUMMARY OF ARGUMENT

Appellant not only claims instructional error. He also contends that Penal Code section 484, subdivison (b)[4] and Vehicle Code section 10855[5] violate due process of law. Whatever the outcome of this particular case, the People of the State of California are interested in preserving the viability of both statutes, as authoritatively construed by the appellate courts of California so as to preserve their constitutionality.

The presumptions embodied in these statutes are presumptions affecting the burden of producing evidence. Such presumptions are inoperative if evidence is introduced which would support a finding of the nonexistence of the presumed fact.

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4. This statute provides:

> Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

Cal. Pen. Code, § 484, subd. (b) (West Ann. 1988).

All statutory references herein are to California statutes, unless otherwise indicated.

5. This statute provides:

> Whenever any person who has leased or rented a vehicle wilfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle.

Cal. Veh. Code, § 10855 (West Ann. 1987).

Penal Code section 484, subdivision (b) and Vehicle Code section 10855 will be hereafter cited respectively as §§ 484, subd. (b) and 10855.

As a matter of policy established in California decisional law, statutes that define mandatory presumptions which lessen the prosecution's burden of proof with respect to an element of an offense are to be so constructed so as to save their constitutionality. Sections 484, subd. (b) and 10855 can be properly construed, as a matter of state law, so as to not offend the due process of law clause of the Fourteenth Amendment.

We concede that the trial court committed error with respect to its instructions pertaining to the §§ 484, subd. (b) and 10855 because these instructions offended due process of law. The court below, however, concluded there was no instructional error. It construed both statutes in question as defining presumptions affecting the production of evidence without the requirement that juries be instructed that the burden of producing evidence is discharged by the introduction of some evidence which would support of finding of the nonexistence of the ultimate fact. As construed by the court below, the statutes offend due process of law because the trial court is not required to appropriately instruct the jury about the legal effect of the presumption. Thus the court below interpreted the statutes contrary to California law since its construction does not save their constitutionality.

The constitutionality of §§ 484, subd.(b) and 10855 can *surely* be saved were the statutes construed to authorize permissive inferences rather than mandatory conclusive presumptions.[6] Another possible construction which would *surely* save the constitutionality of both statues would be to

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6. The jury would not be instructed about the permissive inference unless the trial court first found that there was no evidence introduced which would support the nonexistence of the ultimate fact. Moreover, with respect to this possible construction, the instruction would not advise the jury that the permissive inference is not to be made if some evidence is introduced which would support the nonexistence of the ultimate fact.

construe them as presumptions affecting the burden of production of evidence, but with the requirement that the jurors be instructed that if no evidence was introduced which would support the finding of the nonexistence of the ultimate fact, they *may but are not required to* infer the ultimate fact from the predicate fact.[7] In the case of either construction of the statutes, the jurors are not required to assume the existence of the ultimate fact given the predicate fact.

Another construction *may* save the constitutionality of the statutes, provided this Court upholds the validity of mandatory presumptions affecting the burden of production where it is required that the jury be appropriately instructed as to the effect of the presumption.

In the case of a permissive inference, or a mandatory presumption affecting the burden of producing evidence, due process of law requires that there be a rational connection between the basic facts proved and the ultimate fact presumed and that the latter is more likely than not to flow from the former.

Sections 484, subdivision (b) and 10855 satisfy this requirement once it is clearly understood that the crime of embezzlement, under California law, does not include among its elements the specific intent to *permanently* deprive the owner of possession of the misappropriated property. Since § 10855 by its terms pertains to embezzlement, the authorized ultimate fact includes the intent to permanently or temporarily deprive the owner of his property.

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7. However, if evidence were introduced which would support the finding of the nonexistence of the ultimate fact, the jury would not be given the applicable instruction.

Since § 484, subd. (b) pertains to the intent to commit theft by fraud, it must encompass larceny by trick and device as well as by embezzlement. It therefore appears that here again the "presumption" pertains to an intent to permanently or temporarily deprive the owner of his property. Let us assume *arguendo* that the intent to commit theft by fraud referred to in § 484, subd. (b) entails the intent to permanently deprive the owner of his property, and that the intent to permanently deprive the owner of his property is not more likely than not to flow from the basic facts proved. Nevertheless, insofar as the intent to deprive a person *permanently* of his property entails the lesser intent to deprive a person *temporarily* of his property, this lesser intent is more likely than not to flow from the basic facts proved.

In the instant case, the trial court erred insofar as it instructed the jury that theft necessarily includes the element of an intent to permanently deprive the owner of his property, since embezzlement, a species of theft, does not include this element. This error, however, must be considered as harmless beyond a reasonable doubt since the jury was instructed with respect to the theory of embezzlement, and it is certain that a rational jury would have determined that the intent to deprive the owner of his car was formed after appellant had acquired possession of it.

The trial court committed error, in violation of federal constitutional law, when it failed to *either* instruct the jurors that they may but were not required to infer the ultimate fact from the basic fact *or* that they were not required to infer the ultimate fact from the basic fact if some evidence had been introduced which would support the finding of the nonexistence of the ultimate fact.

The harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967) can be properly applied to instructional error

either by this Court or the court below. After reflection, we no longer adhere to the view that this is an appropriate case for this Court to undertake harmless-error review. Our conclusion is that this Court should remand the matter to the court below with instructions to consider whether the instructional error was harmless beyond a reasonable doubt, after first considering what is the relevant California law.

We first discuss why §§ 484, subd. (b) and 10855, under California law, can be so construed as to save their constitutionality against the contention that they embody mandatory conclusive presumptions in violation of due process of law.[8]

ARGUMENT

I

AS AUTHORITATIVELY CONSTRUED, THE STATUTES UNDER REVIEW ARE CONSTITUTIONALLY VALID

A

FACTUALLY WARRANTED PERMISSIVE INFERENCES ARE CONSTITUTIONALLY VALID; THE VALIDITY OF MANDATORY PRESUMPTIONS AFFECTING BURDENS OF PRODUCING EVIDENCE IS AN OPEN QUESTION

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8. Our discussion will assume *arguendo* that, under California law, the crime of embezzlement does not include among its elements the intent to permanently deprive of owner of his property. We shall also assume that the "presumptions" in §§ 484, subd. (b) and 10855 satisfy the requirement that the ultimate fact in each flows more often than not from the basic facts. The basis for these assumptions is explained in Parts II and III.

According to California law, presumptions created by §§ 484, subd. (b) and 10855 are characterized as presumptions affecting the burden of producing evidence.[9] Subdivision (d) of Penal Code section 484, provides: "The presumptions created in subdivisions (b) and (c) are presumptions affecting the burden of producing evidence."[10] Cal. Pen. Code, § 484, subd. (d) (West Ann. 1988). It was held in *People* v. *Hemmer*, 19 Cal.App.3d 1052, 1062, 97 Cal.Rptr. 516 (Cal.Ct.App. 1971) that "Vehicle Code section 10855 . . . is a presumption affecting the burden of producing evidence." According to Evidence Code section 604,

> The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or

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9. The presumptions are not inconsistent, and we proceed upon the assumption, as did appellant (Brief of Appellant, 3) that the jury can be instructed pursuant to both statutes in an appropriate case -- assuming, of course, that both statutes are valid.

10. Subdivision (c) of Penal Code section 484, provides:

> Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

Cal. Pen. Code, § 484, subd. (c) (West Ann. 1988).

The jury was not instructed with respect to this presumption even though there was some evidence from which it might be inferred that appellant falsely represented what were his residence and business addresses. JA 37.

> nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."[11]

If evidence is introduced which is sufficient to support a finding of the nonexistence of the presumed fact, a jury instruction based upon the presumption affecting the burden of producing evidence should not be given. *People* v. *Hemmer, supra,* 19 Cal.App.3d at 1061. Moreover, where no evidence is introduced which is sufficient to support a finding of the nonexistence of the presumed fact, California statutory law does not require that the jury be informed that the ultimate fact is to be presumed unless evidence is introduced which would support a finding of its nonexistence.

The court below correctly noted that the statutory presumptions in question are defined under California law as presumptions affecting the burden of producing evidence, and then declared that "[t]he effect of such presumptions, under Evidence Code section 604 [quoted above], is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence." JA 61. However, it failed to

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11. Cal. Evid. Code, § 604 (West Ann. 1966).

Evidence Code section 600 provides:

> (a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.
>
> (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

Cal. Evid. Code, § 600 (West Ann. 1966).

perceive that as a matter of federal constitutional law, as established in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and *Francis* v. *Franklin*, 471 U.S. 307 (1985), a statutory mandatory presumption lessening the prosecution's burden of proof beyond a reasonable doubt of an element of the offense charged is constitutionally defective, whether or not it creates a burden affecting the production of evidence.

As *Sandstrom* itself makes clear, the mere characterization as a matter of state law of a statutory presumption as one which affects the burden of production does not remedy the defect if the jury is required to infer the ultimate fact from the basic fact without being told that this duty is discharged if some evidence is introduced which discharges the burden of production. In *Sandstrom*, this Court noted that the Montana Supreme Court had "decisively established that the presumption [*i.e.*, "the law presumes that a person intends the ordinary consequences of his voluntary acts"] at most affected only the burden of going forward with evidence of intent - that is, the burden of production." However, the jury was not told that the presumption could be rebutted by the introduction of some evidence, nor even that it could be rebutted at all. 442 U.S. at 516-517. Hence we feel compelled to concede the *Sandstrom* rule applies to California mandatory presumptions affecting the burden of production of evidence as to an element of an offense in a criminal prosecution, and that this rule was not properly implemented in the case at bar. 442 U.S. at 515-519.

This Court has declared that "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in the light of proven facts before the jury." *Francis* v. *Franklin*, *supra*, 471 U.S. at 314-315. As this Court, in upholding the validity of a statutory "permissive presumption" that presence of a firearm in an automobile is evidence of its

illegal possession by all occupants, explained in *Ulster County Court* v. *Allen*, 442 U.S. 140, 157 (1979):

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond the reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

There are three ways in which a statute may be construed so as to save its constitutionality. In one version of this construction the jurors would be instructed that they may but are not required to infer the ultimate fact from the predicate fact, but would not be additionally instructed that they may make this inference only if there is no evidence which would support the finding of the nonexistence of the ultimate fact. In another version, the jurors would receive the additional instruction just noted. In the latter version, the statute could be understood as defining a "permissive presumption" affecting the burden of producing evidence. Of course, our discussion is understood as pertaining to applications of "presumptions" to elements of an offense incident to a criminal prosecution.

In addition to the two constructions discussed in the preceding paragraph, there is a third way by which the constitutionality of a statute affecting the burden of the production of evidence may be upheld. It is possible that a mandatory presumption that shifts only a burden of production of evidence to the defendant as to an element of the offense is consistent with the Due Process Clause -- provided that

jurors are appropriately instructed about the effect of the presumption. *Sandstrom*, 441 U.S. at 516-517. This is the case because "[t]o the extent that a presumption imposes an extremely low bu den of production - *e.g.*, being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Ulster County Court* v. *Allen*, 442 U.S. at 157 n. 16. However, as this Court has made clear in *Francis* v. *Franklin*, 471 at 314 n. 3, the constitutionality of mandatory presumptions affecting the burden of producing evidence is considered as an open question.

As long as the validity of a mandatory presumption affecting the burden of producing evidence is an open question, a state appellate court may well decide to construe a statute defining this type of presumption as simply requiring that the jurors be instructed that the "presumption" is permissive, or is permissive but inoperative if there is some evidence which would support a finding of the nonexistence of the ultimate fact.

We now proceed to show how, under California law, statutes defining mandatory presumptions affecting the burden of producing evidence which lessen the prosecution's burden of proof beyond a reasonable doubt must and can be construed in order to save their constitutionality.

B

CALIFORNIA LAW REQUIRES THAT SECTIONS 484, SUBDIVISION (B) AND 10855 BE SO CONSTRUED SO AS TO SAVE THEIR CONSTITUTIONALITY

In *People* v. *Roder*, 33 Cal.3d 491, 189 Cal.Rptr. 501, 658 P.2d 1302 (Cal. 1983), the California Supreme Court considered the presumption embodied in Penal Code section 496 that a person shall be presumed to have bought or received property knowing it to have been so stolen or obtained, provided that the People prove three of the statute's four basic facts.[12] The California Supreme Court concluded that the statute clearly established a mandatory presumption within the meaning of *Sandstrom*. 33 Cal.3d at 499, 658 P.2d at 1307. Considered in the light of *Ulster County Court* and *Sandstrom*, subdivision 2 was deemed by the California Supreme Court to be a presumption affecting a burden of

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12. This statute provides in pertinent part:

> Every swap meet vendor as defined in Section 21661 of the Business and Professions Code and every person who principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been stolen or obtained. This presumption may, however, be rebutted by proof.

Cal. Pen. Code, § 496, subd. 2 (West Ann. 1988).

Subdivision 2 as it read at the time of the alleged offense considered in *Roder* is identical with its present form except for its reference to swap meet vendors. 33 Cal.3d at 500, n. 9, 658 P.2d at 1307.

proof because it pertained to an element of the offense of receiving stolen property, *i.e.*,, that the defendant knew that the property which he received was stolen, and it, facially considered, lightened the prosecution's burden of proving all elements of the offense beyond a reasonable doubt.[13] 33 Cal.3d at 499-5023, 658 P.2d at 1307-1309.

However, the *Roder* Court proceeded to construe the offending statute as authorizing only a permissive inference in order to save its constitutionality. 33 Cal.3d at 505-507, 658 P.2d at 1311-1313. The *Roder* Court did more than simply construe Penal Code section 496 as embodying only a permissive presumption. That Court declared:

> The Attorney General reasons that because the holdings in *Ulster County* and *Sandstrom* are applications of the constitutional reasonable doubt rule, under Evidence Code section 501 the principles embodied in those decisions should be read into all California statutes - like section 496 - which through the use of presumptions or similar devices assign the burden of proof in a criminal action.

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13. Evidence Code section 605 defines a presumption affecting the burden of proof as "a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others." Cal. Evid. Code, § 605 (West Ann. Supp. 1989). Evidence Code section 603 defines a presumption affecting the burden of producing evidence as "a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Cal. Evid. Code, § 603 (West Ann. 1966). According to Evidence Code section 520, "[t]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Cal. Evid. Code, § 520 (West Ann. 1966).

> Although the Attorney General's suggestion may require some creative statutory construction and the careful framing of jury instructions, we believe that the proposal is basically sound. Under Evidence Code section 501, any statute which assigns the burden of proof in a criminal case is made subject to the overriding rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt. Before *Ulster County* and *Sandstrom*, it was not clear how that principle affected presumptions in criminal cases, but now that the Supreme Court has - at least in part - clarified the constitutional limits on the use of such presumptions, it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions to constitutionally permissible limits, rather than to abrogate them altogether.

33 Cal.3d at 505-506, 658 P.2d at 1312.[14]

Given the concern of the *Roder* Court with saving the constitutionality of California statutory presumptions, *Roder* must also be understood as declaring a judicial policy that any mandatory presumptions, including those characterized as affecting the burden of production of evidence, which lighten the prosecution's burden of proving beyond a reasonable doubt

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14. Evidence Code section 501 provides: "Insofar any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." Cal. Evid. Code, § 501 (West Ann. 1966). Evidence Code section 522 pertains to the claim of insanity. Penal Code section 1096 provides in part that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt." The rest of section 1096 defines "reasonable doubt." Cal. Pen. Code, § 1096 (West Ann. 1985).

an element of the offense charged, must be so construed as to save their constitutionality in criminal cases.

Roder declares that mandatory presumptions affecting the burden of proof which lessen the prosecution's burden of proof beyond a reasonable doubt as to an element of the offense are to be construed as only authorizing permissive inferences. 33 Cal.3d at 506, 658 P.2d at 1312. *Roder* does not expressly extend the same rule to similar presumptions affecting the burden of producing evidence, such as those embodied in §§ 484, subd. (b) and 10855. Our research does not disclose any California appellate court decision which expressly extends the *Roder* rule to mandatory presumptions affecting the burden of producing evidence.[15]

As we have seen, the court below failed to construe §§ 484, subd. (b) and 10855 in such a manner as to save their constitutionality. That court evidently understood California law as not requiring that, with respect to a statutory presumptions affecting the burden of producing evidence with respect to elements of offenses, the jurors be appropriately instructed as to the effect of the presumption.[16] The court below thus failed to conform to the policy established in *Roder* that "it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions

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15. In *In re Feiock*, 180 Cal.App.3d 649, 225 Cal.Rptr. 748 (Cal.Ct.App. 1986), the California Court of Appeal applied the *Roder* rule to California Code of Civil Procedure section 1209.5 (presumption of contempt based on nonpayment of court-ordered support), but characterized the statutory presumption as one affecting the burden of proof. This Court vacated and remanded, *sub. nom. Hicks* v. *Feiock*, 484 U.S.___, 108 S. Ct. 1423 (1988) so that the state court could determine whether the contempt was civil or criminal.

16. This requirement is necessary in order to save the constitutionality of the presumption as one affecting the burden of producing evidence. However, this requirement may not be sufficient since the validity of such presumptions is an open question according to *Francis* v. *Franklin*.

to constitutionally permissible limits, rather than to abrogate them altogether." 33 Cal.3d at 506, 658 P.2d at 1312.

Clearly one way in which the constitutionality of §§ 484, subd. (b) and 10855 can be saved is for the California courts to construe them as authorizing permissive inferences. The prosecution would be entitled to an instruction with respect to such permissive inferences in an otherwise appropriate case "unless and until some evidence is introduced which would support a finding of [the ultimate fact's] nonexistence." Cal. Evid. Code, § 604 (West Ann. 1966); *People* v. *Hemmer, supra,* 19 Cal.App.3d at 1061.

Another way to save the constitutionality of §§ 484, subd. (b) and 10855 is to treat them as "permissive" statutory presumptions affecting the burden of producing evidence. The statutes would thus be construed to authorize permissive inferences but the jury would also be instructed that they are not authorized to find the ultimate fact from the predicate fact if there was some evidence introduced which would support a finding of the nonexistence of the ultimate fact. As with a permissive inference, the prosecution would not be entitled to the instruction if the trial court made a preliminary determination that some evidence was introduced which would support a finding of the nonexistence of the ultimate fact.

Although the validity of a mandatory presumption affecting the burden of producing evidence, which lessens the prosecution's burden of proof with respect to an element of the offense, is an open constitutional question, California appellate courts may nevertheless opt to construe a statute defining a mandatory presumption affecting a burden of production of evidence by simply requiring that the jury be instructed about the effect of the presumption. In that case, it is arguable that the quasi-permissive inference authorized by

the statute as thus construed is consistent with due process of law.[17]

Obviously, we are in no position to predict how California appellate courts, including the court below, would construe §§ 484, subd. (b) and 10855 in order to save their constitutionality. We can only be certain that these courts, in order to conform with the policy established in *Roder*, must construe these statutes in order to save their constitutionality.

C

THE IMPLICIT CONSTRUCTION OF THE COURT BELOW OF §§ 484, SUBD. (B) AND 10855, DEFINING MANDATORY PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE WITHOUT REQUIRING JURY INSTRUCTION AS TO THE EFFECT OF THE PRESUMPTION, IS NOT AN AUTHORITATIVE STATEMENT OF CALIFORNIA LAW

Since the court below found no instructional error based upon §§ 484, subd. (b) and 10855, it implicitly construed these statutes as defining mandatory presumptions affecting the burden of production of evidence without the requirement of a jury instruction as to the effect of the presumption. As we shall show, that construction is not an authoritative statement of California law.

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17. California appellate courts might well decide that any statute defining a mandatory presumption affecting the burden of production of evidence which lessens the prosecution's burden of proof as to an element of a crime should be construed as authorizing a permissive inference, rather than risking a determination by this Court that such mandatory presumptions offend due process of law even though the jurors are to be instructed as to the effects of the presumption.

It should be noted that: First, the opinion of the court below was not published. Second, because it was not published, it may not be cited as precedent.[18] Third, discretionary review by the state intermediate appellate court is possible only if either (a) the appellate department of the superior court certifies that a case be transferred or (b) the opinion of the lower court is published or to be published.[19]

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18. Rule 977, California Rules of Court, provides in pertinent part:

(a) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

19. Rule 62, California Rules of Court, provides in pertinent part:

(a) A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Rule 63, California Rules of Court, provides in pertinent part:

(a) The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. . . .

(continued...)

Since neither condition was applicable, the case could not be transferred to the Court of Appeal, the intermediate appellate court in California. Fourth, discretionary review by the California Supreme Court of a judgment of the appellate department of the superior court is not possible unless the case has been ordered transferred to the Court of Appeal.[20]

We are mindful that the ordinary rule is that this Court takes the law of a particular state as that provided by the state appellate court's resolution in the case under review. *Hick* v.

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19. (...continued)

Cal. Civ. & Crim. Rules (West Ann. 1981).

20. Rule 27.5, California Rules of Court, provides in pertinent part:

> (a) On its own motion or on petition of a party, the Supreme Court may order a cause pending in a Court of Appeal transferred to itself. For purposes of this rule, a cause is pending until the decision of the Court of Appeal is final as to that court; a cause decided by the appellate department of a superior court is not pending in a Court of Appeal until it is ordered transferred pursuant to rule 62.

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Rule 28 provides in pertinent part:

> b) A party seeking review [in the Supreme Court] must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final as to that court, but a petition may not be filed after denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court....

Cal. Civ. & Crim. Rules (West Ann. Supp. 1989).

Refusal by a Court of Appeal ordinarily terminates appellate review of a municipal court case. Extraordinary relief has been permitted, not to review error of the appellate department of the superior court, but when it exceeds it jurisdiction, such as refusing to follow precedent. *Dvorin* v. *Appellate Department*, 15 Cal.3d 648, 650, 125 Cal.Rptr. 771, 542 P.2d 1363, 1364 (Cal. 1975).

Feiock, supra, 108 S. Ct. at 1428. Such resolution may not be "disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.*, 108 S. Ct. at 1428 n. 3.

The implicit construction by the court below of §§ 484, subd. (b) and 10855 may be properly disregarded because, in view of the policy established in *Roder*, we have the necessary "persuasive date that the highest court of the state would decide otherwise."

The statutes under review, must be construed according to the principle announced in *People* v. *Roder* in order to save their constitutionality. If so construed, we still must determine whether such construction would conform to the due process of law requirement that the ultimate fact in each statute is more likely than not to flow from the basic facts proved. However, before making this determination, we must first address the issue whether embezzlement includes the intent to permanently deprive the owner of his property as an element of that offense.

II

UNDER CALIFORNIA LAW, THE OFFENSE OF EMBEZZLEMENT DOES NOT INCLUDE THE INTENT TO PERMANENTLY DEPRIVE THE OWNER OF HIS PROPERTY AS AN ELEMENT

Appellant states that under California law the crime of grand theft auto, in violation of Penal Code section 487, subdivision 3, "has long been interpreted to require a specific intent to 'deprive the owner of the automobile permanently.' *People* v. *Pater*, 267 Cal.App.2d 921, 73 Cal.Rptr. 823, 825 ([Cal.Ct.App.] 1969)." Brief of Appellant, 3. Appellant surely cannot be blamed for making this statement, given *Pater* and

the fact that the jury received the standard instruction, which is used when a defendant is charged both with grand theft auto (Pen. Code, § 484, subd.(a)) and unlawful taking/driving (Veh. Code, § 10851), and which specifies that theft requires the specific intent to permanently deprive the owner of his property.[21] We shall proceed to show, however, that theft encompasses the crime of embezzlement which, under California law, does not include the intent to permanently deprive the owner of his property among its elements.

The crime of theft, as defined in Penal Code section 484[22] consolidates the crimes of theft by larceny (including larceny by trick and device), by false pretenses, and by embezzlement.[23] However, this statutory consolidation does not change the elements of the component offenses. *People* v. *Ashley*, 42 Cal.2d 246, 258, 267 P.2d 271, 279 (Cal. 1954). As the *Ashley*

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21. JA 8. CALJIC 14.35, also given to the jury, is to the same effect. JA 6. Both instructions (CALJIC 14.35 and 14.37) are approved by the Committee on Standard Jury Instructions, of the Superior Court of Los Angeles County, California. They are now contained in 2 CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (5th Ed. 1988) 155, 159-161.

22. This statute provides in pertinent part:

> (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

Cal. Pen. Code, § 484, subd. (a) (West Ann. 1988).

23. Appellant was charged with grand theft auto in count 1 of the complaint. JA 3. Grand theft is defined by Penal Code section 487 as "theft committed in any of the following cases: . . . . 3. When the property taken is an automobile. . ." Cal. Pen. Code, § 487 (West Ann. 1988).

court explained: "Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession."[24] *Ibid.* There is no larceny without an intent to steal, *i.e.*, the intent to appropriate property of another and permanently deprive him of its possession. 2 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW (2d ed. 1988) §584, p. 660. There is no larceny by trick and device when the defendant obtains possession by fraud or trickery unless he has an intent to steal at the time of the taking. *Id.*, § 585, pp. 660-661; *People* v. *Salorse*, 62 Cal. 139, 141-142 (Cal. 1882); *People* v. *Jackson*, 138 Cal. 462, 464, 71 P. 566, 567 (Cal. 1903).

On the other hand, the California crime of embezzlement does not include the intent to steal as an element. Penal Code section 503 defines "embezzlement" as "the fraudulent appropriation of property by a person to whom it has been entrusted." Cal. Pen. Code, § 503 (West Ann. 1988). Although the crime of embezzlement includes among its elements the specific intent to deprive the owner of his property, the specific intent need not be to deprive the owner *permanently* of possession. This was so held in *People* v. *Jackson*, *supra*, 138 Cal. at 464, where the California Supreme Court found no error in an embezzlement instruction that "the property must have been appropriated and converted to the use of the party to whom it had been intrusted, with the intent, either temporarily or permanently, of depriving the

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24. We need not be concerned with false pretenses since there is no contention that title passed to appellant when he obtained its possession pursuant to the rental agreement. The jury was only instructed as to theft by larceny by trick and device and theft by embezzlement, since there had been no trespassory taking by appellant. JA 6, 10-12.

owner of his property) as an element is well-settled. *People* v. *Talbot*, 220 Cal. 3, 16, 28 P.2d 1057, 1062 (Cal. 1934); *People* v. *McClain*, 140 Cal.App.2d 899, 901, 295 P.2d 952, 953 (Cal.Ct.App. 1956); *People* v. *Britz*, 17 Cal.App.3d 743, 751, 95 Cal.Rptr. 303 (Cal.Ct.App. 1971), *People* v. *Jackson*, 193 Cal.App.3d 393, 401, 238 Cal.Rptr. 327 (Cal.Ct.App. 1987); 2 WITKIN & EPSTEIN, *supra*, §§ 592, 597, pp. 668, 673. Indeed, it is expressly specified by statute that an intent to restore the property embezzled is no ground of defense. Cal. Pen. Code, § 512 (West Ann. 1988).

The doctrine of *People* v. *Pater, supra,* that theft requires an intent to steal, was erroneously fashioned, doubtless because the underlying facts involved a trespassory taking of an automobile. The *Pater* doctrine was simply ignored in the subsequently decided embezzlement cases of *Britz* and *Jackson*, both of which are in accord with the earlier California Supreme Court decision of *People* v. *Talbot, supra*. *Pater* should therefore not be considered as authoritative. Needless to say, the California Court of Appeal is without authority to overrule a doctrine established by the California Supreme Court. *Auto Equity Sales* v. *Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937, 939-940 (Cal. 1962).

In the instant case, the jury was instructed that theft includes embezzlement, and that embezzlement includes the element: "That with the specific intent to deprive the other person of his property, the person fraudulently appropriated or converted it to his own use or purpose." JA 10, 12. The jury was not expressly instructed that embezzlement does not include the intent to permanently deprive the owner of his property. Indeed, the giving of CALJIC 14.35 and 14.37 (JA 6, 8) would, in all likelihood, be taken as meaning that theft

requires an intent to permanently deprive the owner of his property as an element of embezzlement.[25]

Clearly, the trial court committed error insofar as it implicitly instructed the jury that theft requires an intent to permanently deprive the owner of his property. However, we see nothing in the opinion of the court below that it endorsed the doctrine that embezzlement requires an intent to steal. JA 60-62.

Although in the instant case the jury was instructed that grand theft auto requires the intent to permanently deprive the owner of his property (JA 6, 8), such error must be deemed harmless since the jury must have necessarily found the lesser intent to temporarily deprive the owner of its property. To paraphrase *Killian* v. *United States*, 368 U.S. 231, 258 (1961), "it is evident that the erroneous [instruction] could not have prejudiced [appellant] for it. . . exacted a higher standard of proof of [intent] than the law required."[26]

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25. The instant case emphasizes the need for CALJIC 14.35 and 14.37 (JA 6, 8) to be revised so that it is consistent with the doctrine that embezzlement does not include an intent to steal.

26. In *Killian*, defendant was convicted of having violated 18 U.S.C. § 1001 by falsely stating, in an affidavit filed with the National Labor Relations Board, that he was not a member of the Communist Party nor affiliated with it. The paraphrased language in the accompanying text is taken from the following:

> Petitioner argues that because the first paragraph of the instruction stated that affiliation "means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party," and the third paragraph of the instruction stated that "affiliation . . . means a relationship which is equivalent or equal to that of membership in all but name," it was contradictory and confusing. We agree that the third paragraph appears inconsistent with the first. However, it is evident that the erroneous third paragraph could not have prejudiced petitioner for it, though inconsistent with the correct first paragraph, exacted a higher

(continued...)

California law is similar in effect. In *People* v. *Rodriquez*, 50 Cal.App.3d 389, 123 Cal.Rptr. 185 (Cal.Ct.App. 1975), the California Court of Appeal held that the elements of the crime of possession of a deadly weapon in county jail, proscribed by California Penal Code section 4574, did not include the specific intent of violent use. The *Rodriquez* court further stated:

> Defendant contends the jury was improperly instructed in regard to his intended use of the razor blade. In fact, however, the jury was instructed, at defendant's request, that the People had to demonstrate beyond a reasonable doubt that the intended use of the razor blade was dangerous rather than harmless. This instruction was error. However, the error was vastly in the favor of defendant. It certainly does not justify reversal.

50 Cal.App.3d at 397. Fn. omitted. Clearly any instructional error concerning intent to permanently deprive the owner of his property was harmless in the instant case since embezzlement does not include that intent among its elements.

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26. (...continued)
standard of proof of affiliation than the law required.

368 U.S. at 257-258.

III

THE PERMISSIVE OR QUASI-INFERENCE AUTHORIZED BY EITHER STATUTE IN QUESTION, AS PROPERLY CONSTRUED, IS FACTUALLY JUSTIFIED[27]

The test pertaining to the reliability of permissive presumptions is the "more likely than not" standard employed in *Leary* v. *United States*, 395 U.S. 6 (1969) and confirmed in *Ulster County*, 442 U.S. at 166, *i.e.*, whether "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary*, 395 U.S. at 36.

We have thus far shown that §§ 484, subd. (b) and 10855, properly construed in accordance with *People* v. *Roder* in order to save their constitutionality, authorize permissive or quasi-permissive inferences. Moreover, we have shown that embezzlement, a species of theft, does not include an intent to steal. Hence the inference or quasi-inference authorized by § 10855 is factually warranted when the ultimate fact is the intent to temporarily or permanently deprive the owner since that statute expressly pertains to embezzlement only. The same remarks apply *mutatis mutandis* to the inference or

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27. We use the term "quasi-permissive inference" to apply to a mandatory presumption affecting a burden of production of evidence by the defendant, where it is required that the jury be instructed as to the effect of the presumption. Our usage is justified because, as this Court put it in *Ulster County*, 442 U.S. at 157 n. 16: "To the extent that a presumption imposes an extreme low burden of production - *e.g.*, being satisfied by 'any' evidence - it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." The term "quasi-permissive inference" is used in order not to prejudge, as it were, the issue of the constitutionality of such presumptions.

quasi-inference authorized by § 484, subd. (b), as properly construed, insofar as that statute pertains to embezzlement.[28]

Surely, the inferred fact authorized by § 10855 (*i.e.*, the wilful and unintentional failure to return a leased or rented vehicle to its owner within five days after the lease or rental agreement has expired) is at least more likely than not to flow from the predicate fact -- with the probability of the inference enhanced in the absence of contrary evidence. In *People* v. *Cloward*, 196 Cal.App.2d 669, 672, 16 Cal.Rptr. 772 (Cal.Ct.App. 1961), the Court of Appeal explained:

> Under section 10855 the facts to be proved are that a person has leased or rented a vehicle and that he has *willfully and intentionally* failed to return the vehicle to the owner within five days *after the lease or rental agreement has expired.* "Willfully" means done with a purpose or willingness to commit the act. (Pen. Code, § 7, subd. 1.) "Intentionally" means done with intention of purpose, intended, designed. (*People* v. *McCree*, 128 Cal.App.2d 196, 202 [275 P.2d 95 (Cal.Ct.App. 1924)].) Mere proof of negligent failure to return the vehicle would not raise the presumption. We think it manifest there is a rational connection between the facts proved and the fact presumed. ([Citation].) The presumption is based on past experience and reasonable probabilities.

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28. Appellant's argument about the factual implausibility of the § 10855 "presumption" is based upon the mistaken assumption that embezzlement requires the intent to steal. Without argument, but for proper reasons given his mistaken assumption about embezzlement, appellant contends that the § 484, subd. (b) "presumption" is factually unwarranted. Brief of Appellant, p. 31 n. 28.

Appellant asserts that, with respect to § 10855, the "proof of the predicate fact -- intentional failure to return a car within five days of a rental agreement's expiration -- generates a presumption with respect to *all* of the constituent elements of the offense," *i.e.*, embezzlement. Brief for Appellant, 3. We must agree that appellant is *formally* correct. However, leasing or renting of a vehicle and the transfer of possession to the lessee or renter means that property has been accepted pursuant to a relationship of trust and confidence. Thus proof of the predicate fact itself includes proof of two of the elements of embezzlement: (1) " [a] relation of trust and confidence existed between two persons," and (2) [p]ursuant to such relationship one of those persons accepted property entrusted to [him][her] by the other person." CALJIC 14.07, 2 CALIFORNIA JURY INSTRUCTIONS - CRIMINAL (5th ed. 1988) 129. More succinctly, the two purported elements constitute one: that property has been entrusted by one person to another. Cal. Pen. Code, § 503 (West Ann. 1966); *People* v. *Jackson, supra*, 138 Cal. at 464; *People* v. *Salorse, supra,* 62 Cal. at 142 (held, that the crime of embezzlement took place when the defendant, who had hired a horse and thus become a bailee, thereafter "absconded from the county, taking the horse with him. . . . with the fraudulent intent to appropriate the horse, and to deprive the owner of it"). In other words, proof that property had been entrusted to the defendant, together with the willful and intentional failure to return the leased or rented vehicle within five days after the expiration of the agreement, generates the ultimate fact: that the property had been fraudulently appropriated by defendant, *i.e.*, "[w]ith the specific intent to deprive the other person of [his][her] property, the person appropriated or converted it to [his][her] use or purpose." CALJIC 14.07, *supra*, at 129. See JA 12. Hence appellant's contention, although formally correct, is only diaphanously substantial.

It appears to us that the predicate facts set forth in § 484, subd. (b) (*i.e.*, failure of lessee or renter to return property within twenty days after the owner has made written demand by certified or registered mail following the expiration of the written lease or rental agreement) generate more often than not the presumed (or rather, the inferred) fact specified therein (*i.e.*, the intent to commit theft by fraud) insofar as this embraces the intent to steal. However, assuming *arguendo* that the § 484, subd. (b) "presumption" does not satisfy the "more often than not" test of *Leary-County Ulster* insofar as the fraudulent intent embraces an intent to steal, it nevertheless satisfies the test insofar as the intent to commit theft by fraud embraces the fraudulent intent to temporarily deprive the owner of his property -- since embezzlement is one form of theft by fraud[29].

V

THE CHAPMAN HARMLESS-ERROR TEST CAN PROPERLY APPLY TO THE INSTANT CASE, BUT SHOULD BE APPLIED BY THE COURT BELOW

INTRODUCTION

As we have argued, neither § 484, subd. (b) nor § 10855 violates due process of law if each is construed to authorize a permissive inference. On the other hand, it is an open question whether these statutes violate due process of law if construed so as to authorize that kind of quasi-permissive inference implicit in the concept of a mandatory presumption

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29. It appears that there is insufficient evidence to sustain appellant's conviction of theft based upon the theory of larceny by trick and device. *See People* v. *Jackson*, 138 Cal. 462, 464, 71 P. 566, 567 (Cal. 1903). Clearly, appellant's conviction of grand theft auto can only be warranted upon a theory of embezzlement. It is therefore in this context that the factual warrantability of the § 484, subd. (b) "presumption" is to be judged in the instant case.

affecting the burden of producing evidence -- provided the jury is appropriately instructed about the effect of the presumption.

However, the issue critical to appellant in this case is not the validity of a "presumption" statute as authoritatively construed, but rather how it has been applied to him.[30] The critical question is how the jury was instructed and how a reasonable jury would have understood the instructions. As this Court explained in *Francis* v. *Franklin*: "The federal constitutional question is whether a reasonable juror could have understood [the relevant instructions] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." 471 U.S. at 316.

We again concede, contrary to the Appellate Department's judgment, that the trial court committed instructional error with respect to the statutory presumptions.[31] Clearly, both instructions could reasonably be taken as directing the jury to find the presumed fact upon proof of the predicate facts. They were not told in substance that the presumed fact would be discharged upon the introduction of evidence to the contrary. They were not told that they may, but were not required, to infer the ultimate fact if the basic facts were proved. JA 15. Other instructions did not cure the instructional error.

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30. The discussion which follows assumes that §§ 484, subd. (b) and 10855 are deemed as having been so construed by California appellate courts as to conform with due process of law.

31. We conceded the point in our Respondent's Brief, at p. 5, and in our Motion of Appellee to Dismiss, at p. 10, filed with this Court.

The next question is, therefore, whether the beyond-the-reasonable-doubt harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967) can apply to the instant case. The next question, assuming the test can apply, is whether this Court should undertake the application of the test to the instant case. And, finally, assuming the test is applied, what is the result.

A

THERE IS NO IMPEDIMENT TO THE USE OF THE *CHAPMAN* HARMLESS-ERROR TEST TO THE INSTANT CASE

Appellant contends that the *Chapman* harmless-error test cannot be properly applied to the instant case. He argues that, unlike mandatory rebuttable presumptions, an instruction that directs a conclusive presumption on an element of the offense can never be harmless. Brief of Appellant, 11, 36-38.

Appellant, we submit, has egregiously misunderstood this Court's opinion in *Rose* v. *Clark*, 478 U.S. 570 (1986). In that case, this Court considered the question of whether the harmless-error standard of *Chapman* v. *California* applies to jury instructions that violate the principles of *Sandstrom* and *Francis*, and held that it did. Although *Rose* v. *Clark* involved an instruction embodying a mandatory rebuttable presumption, there can be no doubt that the holding pertains equally to mandatory conclusive presumptions. It should be noted that *Sandstrom* involved a mandatory conclusive presumption. Yet, this Court in *Rose* declared: "Nor is *Sandstrom* error equivalent to a directed verdict for the State." 478 U.S. at 580. Thus appellant errs when he claims in his brief that this Court deems a mandatory conclusive presumption pertaining to

elements of an offense to be the equivalent of a directed verdict. Brief of Respondent, 36. As this Court has further explained in *Pope* v. *Illinois*, 481 U.S. 497, 504 n. 7 (1987): "To the extent that cases prior to *Rose* may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof. . . , after *Rose*, they are no longer good authority."

Contrary to appellant's assertion (Brief of Appellant, 38 n. 36), California applies the *Chapman* test, instead of a reversal-per-se standard, to instructional errors which impermissibly lessen the burden of the prosecution to prove each element of the crime beyond a reasonable doubt. *People* v. *Dyer*, 45 Cal.3d 26, 62-64, 246 Cal.Rptr. 209, 753 P.2d 1, 20-23 (Cal. 1988).[32]

B

THE COURT BELOW SHOULD APPLY THE HARMLESS-ERROR TEST IN THE FIRST INSTANCE

Since the *Chapman* harmless-error test is properly applicable to the instant case, should this Court itself determine whether or not the test is satisfied, or should the case be remanded so that the Appellate Department should undertake that task?

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32. Earlier, in *People* v. *Lee*, 43 Cal.3d 666, 670-676, 238 Cal.Rptr. 406, 738 P.2d 752, 755-758 (Cal. 1987), the California Supreme Court had intimated that the *Chapman* harmless-error test would apply to California cases instead of the reversal-per-se standard. The *Chapman* test had been previously applied in *People* v. *Milham*, 159 Cal.App.3d 487, 505, 205 Cal.Rptr. 688 (Cal.Ct.App. 1984) and *People* v. *Banks*, 147 Cal.App.3d 360, 368, 195 Cal.Rptr. 101 (Cal.Ct.App. 1983) to instructions concerning presumptions pertaining to elements of an offense.

We, of course, recognize that this Court has declared:

> Although we "plainly have the authority" to decide whether, on the facts of a particular case, a constitutional error was harmless under the *Chapman* standard, we "do so sparingly."

Rose v. *Clark*, *supra*, 478 U.S. at 584. We urged the court below to undertake that analysis, but that court declined the task having concluded that there was no instructional error pertaining to the presumptions. In our Motion to Dismiss Appeal, filed in this Court, we urged this Court to find the instructional error harmless beyond a reasonable doubt. However, after further reflection, we can no longer in good conscience hold that it is appropriate for this Court to make the *Chapman* analysis in the first instance.

The reasons for our change-of-mind are as follows. Of course, we are mindful that as a matter of judicial economy as well as deference for state courts, this Court is understandably reluctant to make a harmless-error inquiry when the same has not been done by the state appellate court. However, we urged in our Motion of Appellee to Dismiss that "it is evident that [the court below] would have concluded that the *Chapman* test was satisfied, assuming instructional error concerning the statutory presumptions in question." Motion of Appellee to Dismiss, 10. One important reason was our belief that the court below "concluded that 'defendant never offered testimony concerning the nonexistence of the presumed facts stated in Penal Code section 484 subdivision (b) and Vehicle Cope section 10855." *Ibid.* As appellant accurately points out, the court below did not expressly "consider or reject the possibility that the *State's* witnesses provided evidence supporting 'the non-existence of the presumed facts.'" Brief of Appellant, 29 n. 27. Appellant urges that "one aspect of the State's evidence [*i.e.*, the location

of the rental car when it was recovered] was inconsistent with an intent to keep the car permanently." *Id.* at 39.[33]

We *think* that the court below intended to mean that no evidence was introduced which supported the nonexistence of the presumed facts. We *think* that this is the case because, assuming *arguendo* that the location of the car when it was recovered tends to support the nonexistence of an intent to steal, it does not tend to support the nonexistence of an intent to temporarily deprive a person of his property. However, candor compels us to acknowledge that we cannot be sure of the intention of the court below as to what it meant when it said that "defendant never offered testimony concerning the nonexistence of the presumed facts."

Another reason why we think it more appropriate for the harmless-error testing to be undertaken first by the court below is because this Court, were it to undertake this task, might eventually decide that a conclusion could not be properly reached without augmenting the record on appeal by including at least a partial reporter's transcript.[34] It is obviously not in the interest of judicial economy for this Court to initiate an analysis which might well have to be aborted.

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33. According to the settled statement on appeal, "[t]he automobile was recovered the same day in the parking lot adjoining appellant's business address." JA 37. However, appellant states in his brief that "it was undisputed that the car was found at the local business address provided by appellant at the time he executed the contract." Brief of Appellant, 39.

34. Since our letter of January 22, 1989, addressed to Chief Deputy Clerk Francis J. Lorson, we have not undertaken to make further inquiry as to whether obtaining the reporter's transcript will be possible because we were informed that Appellant's counsel would proceed with the appeal notwithstanding the absence of the transcript. We cannot, therefore, now advise the Court as to whether an effort to obtain a whole or partial reporter's transcript will be successful.

Of course, yet another reason why this Court may judge that it would be inappropriate for it to undertake a harmless-error review at this time is that its members do not share our views with the same confidence we do as to what is the law of the State of California concerning the requisite intent in embezzlement, whether all mandatory presumptions relating to elements of an offense are to be deemed as permissive or quasi-permissive inferences, and so forth.

Appellant's argument that the instructional errors pertaining to the "presumptions" are not harmless beyond a reasonable doubt is based upon the assumption that the dispositive issue is the intent to steal. Brief of Appellant, 11-12, 38-41. We have shown that this assumption is egregiously erroneous, however understandable. Our view is that even on the present record, the instructional error is harmless beyond a reasonable doubt. Since, however, we now believe that the court below should make the harmless-error inquiry in the first instance, it is unnecessary for us to argue the matter further here.

CONCLUSION

Little did we anticipate that this case, resulting in an unreported opinion having no precedential value under California law, would be considered by this Court as one of the last cases of mandatory appeals in instances where state courts sustain the federal constitutional validity of state statutes. But here we are.

This Court, having noted probable jurisdiction with respect to the questions presented in the Jurisdictional Statement pertaining to the statutory presumptions, might quite simply reverse the judgment and remand the case for a harmless-error analysis by the court below. However, as we see it, the Court must determine whether the *Chapman* harmless-error test is

applicable to the kind of instructional error involved in this case. In order to do so, it must consider what is the relevant law of California with respect to embezzlement and purported statutory presumptions. Of course, we have a keen interest in the continued viability of subdivision (a) of Penal Code section 484 and Vehicle Code section 10855, as we understand them. We are anxious, therefore, that nothing appears in the Court's opinion which would undermine the ability of California courts to construe these statutes so as to uphold their constitutionality.

In view of all the foregoing, we submit that the judgment should be reversed and the case remanded to the court below for a determination whether the *Chapman* harmless-error test is satisfied after applying state and federal law so as to uphold the validity of the California statutes now under attack.

Respectfully submitted,

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